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Supreme Court, U.S.
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No. 93-208

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1993

IDAHO HISPANIC CAUCUS, INC., AN IDAHO NON-PROFIT CORPORATION, ET AL.,
APPELLANTS,

v.

STATE OF IDAHO, ET AL.,
APPELLEES,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

JURISDICTIONAL STATEMENT

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88 pp

QUESTIONS PRESENTED

1. Did the Court err in ruling that the Voting Rights Act does not apply to those who assert a minority influence dilution claim?

2. Does the three-prong test of *Thornburg v. Gingles*, 478 U.S. 30 (1986) apply to a minority influence dilution claim?

3. Did the Court err in granting summary judgment to the Defendant?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, HUMBERTO FUENTES, RUDY PEÑA, ERNESTO SANCHEZ, MARIA NAVA, LOU RODRIGUEZ, JUAN VASQUEZ, MARIA SALAZAR, FRANCIE KATSILOMETES, GLADYS ESQUIBEL, TONY GALLOWAY, JR., KENNY AND MARY BRONCHO, JESSE RAY SANCHEZ, FERRIN MATTHEW BRONCHO, AND JULIAN SANCHEZ, as individuals and representative citizens of the State of Idaho were Plaintiffs in the District Court and are Appellants here; and THE HONORABLE CECIL ANDRUS, Governor of the State of Idaho, THE HOUSE OF REPRESENTATIVES OF THE STATE OF IDAHO, THE SENATE OF THE STATE OF IDAHO, and THE HONORABLE PETER T. CENARRUSA, Secretary of State of the State of Idaho, were Defendants in the District Court and are Appellees here.

TABLE OF CONTENTS

OPINIONS 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES 4

STATEMENT OF THE CASE 5

THE QUESTION IS SUBSTANTIAL 11

CONCLUSION 12

APPENDIX 1

APPENDIX A
ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT 3

APPENDIX B
ORDER FROM THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT TRANSFERRING JURISDICTION TO THE UNITED STATES SUPREME COURT 46

APPENDIX C
NOTICE OF APPEAL 48

APPENDIX D
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE 52

TABLE OF AUTHORITIES

Cases

Chisom v. Roemer, ____ U.S. ____, 111 S. Ct. 2354 (1991) 11

Growe v. Emison, ____ U.S. ____, 113 S.Ct. 1075 (1993) 10

Thornburg v. Gingles, 478 U.S. 30 (1986) . . . i, 9, 10

Voinovich v. Quilter, ____ U.S. ____, 113 S.Ct. 1149 (1993) 10

Constitutional Provisions and Statutes

28 U.S.C. § 1331 (1988) 4

28 U.S.C. § 1343(4) (1988) 4

28 U.S.C. § 2201 (1988) 4

28 U.S.C. § 2202 (1988) 4

28 U.S.C. § 2284 (1988) 4

28 U.S.C. § 1253 (1988) 2

28 U.S.C. § 1253 (1988) 2, 4

28 U.S.C. § 1631 (1988) 3, 4

42 U.S.C. § 1973 (1988). . . . . passim

42 U.S.C. § 1973*l* (1988) 4

42 U.S.C. § 1983 (1988) 4

42 U.S.C. § 1988 (1988) 4

I.D. CONST. art. 1 § 2 4

I.D. CONST. art. III §§ 2-5 4

I.D. CONST. art. VI §§ 1-7 4

Idaho Code § 67-202 (Supp. 1992). . . . . .passim

U.S. CONST. amend. XIV 4

U.S. CONST. amend. XV 4

No.

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1993

IDAHO HISPANIC CAUCUS, INC.,
AN IDAHO NON-PROFIT
CORPORATION, ET AL.,
APPELLANTS,

V.

STATE OF IDAHO, ET AL.,
APPELLEES,

ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF IDAHO

JURISDICTIONAL STATEMENT

The Appellants, the Idaho Hispanic Caucus, Inc., et. al., respectfully pray that the Supreme Court of the United States review the order of the United States District Court for the District of Idaho entered in this preceding on December 10, 1992.

OPINIONS

The official and unofficial reports of opinions delivered in this case: only the order which is included in the Appendix.

JURISDICTION

Jurisdiction of this Court is invoked based on 28 U.S.C. § 1253 (1988) which allows direct appeals from decisions of three-judge courts.

On December 10, 1992, a panel of three judges granted summary judgment to the Defendants. Plaintiffs filed their Notice of Appeal on all Issues on January 7, 1993. The Notice of Appeal was filed in error with the Court of Appeals for the Ninth Circuit. Upon the filing of briefs on the issues, it was determined that the Notice of Appeal was filed in error with the Ninth Circuit. On June 25, 1993, the United States Court of Appeals of the Ninth Circuit ordered that the Defendant's Motion to Dismiss the appeal for lack of jurisdiction was granted and that the appeal shall be transferred to the United States Supreme Court pursuant to 28 U.S.C. § 1631 (1988) which allows a transfer to cure for want of

jurisdiction. Under 28 U.S.C. § 1631, the court shall, if it is in the interest of justice, transfer such appeal to any other such court in which the appeal could have been brought at the time it was filed with notice and the appeal shall proceed as if it had been filed in or noticed for the court to which it was transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred. Therefore, based on 28 U.S.C. § 1631, the notice of appeal for the U.S. Supreme Court was timely filed on January 7, 1993 since that was within thirty (30) days of the original entry of judgment by the three-judge District Court. Since this appeal was transferred on June 25, 1993 this Statement of Jurisdiction is being submitted within sixty (60) days of the transfer date which is the first date Plaintiffs had the opportunity to file a Statement of Jurisdiction. Based on the transfer under 28 U.S.C. § 1631, this Court has proper jurisdiction over the matter.

CONSTITUTIONAL PROVISIONS AND STATUTES

The following constitutional provisions and statutes involved in this case are set forth below.

U.S. CONST. amend. XIV; U.S. CONST. amend. XV; I.D. CONST. art. 1 § 2; I.D. CONST. art. III §§ 2-5; I.D. CONST. art. VI §§ 1-7; 28 U.S.C. § 1253 (1988); 28 U.S.C. § 1331 (1988); 28 U.S.C. § 1343(4) (1988); 28 U.S.C. § 1631 (1988); 28 U.S.C. § 2201 (1988); 28 U.S.C. § 2202 (1988); 28 U.S.C. § 2284 (1988); 42 U.S.C. § 1973 (1988); 42 U.S.C. § 1973*l* (1988); 42 U.S.C. § 1983 (1988); 42 U.S.C. § 1988 (1988); Idaho Code § 67-202 (Supp. 1992).

The pertinent text of the constitutional provisions and statutes is set forth in the appendix.

STATEMENT OF THE CASE

The Idaho Hispanic Caucus, Inc., an Idaho nonprofit corporation, as well as individual Hispanic and Native American citizens of Idaho filed the Complaint in the United States District Court for the

District of Idaho on May 5, 1992, alleging that their minority influence had been diluted under the reapportionment plan, House Bill 760, of the 1992 Legislative Session, now codified as Idaho Code § 67-202. The Defendants, Governor Cecil Andrus, House of Representatives of the State of Idaho, the Senate of the State of Idaho, and the Honorable Peter T. Cenarrusa are all named in their official capacities. The State of Idaho is named as a Defendant by virtue of its officials' acts performed by the aforementioned officers in the Idaho State Legislature.

On March 2, 1992, Governor Andrus signed into law the reapportionment plan known as House Bill 760. At the time the reapportionment boundaries were established in accordance with Article III of the Idaho Constitution, the Defendants were obligated to heed the totality of the political, social, economical and racial circumstances then pertaining through the areas that would be affected by the redistricting and to take into account the history of the political jurisdiction which is presently embraced by the legislative districts. The State's obligation accrued by reason of the mandate set forth in the 14th and 15th

Amendments to the U.S. Constitution and codified in the Voting Rights Act Amendments of 1982, Title 42, United States Code § 1973, as well as the equal protection clause and the suffrage clauses of the Idaho Constitution in Articles I and VI, respectively.

There are two minority groups in Idaho which have populations large enough to have a substantial claim concerning minority influence. Those minority groups are Hispanics and Native Americans. The Hispanics and Native Americans are concentrated in three areas of the state in percentages large enough to permit them to influence the outcome of elections, but for the fact that the boundaries of House Bill 760 were drawn in a way to almost totally dilute their influence. The Hispanic and Native Americans in the state of Idaho also reside in geographically compact areas. The Hispanics are concentrated in Canyon County, the Magic Valley and the Pocatello area and the Native Americans are concentrated in and around the reservations of the Coeur d'Alene Tribe, the Nez Perce Tribe and the Shoshone-Bannock Tribe.

The 1990 census reported a total Idaho population of 1,006,764 persons. The census reported

12,418 Native Americans and 52,927 Hispanics in Idaho. Although the Census Bureau admitted to an undercount of Hispanics and Native Americans, no adjustment to the census numbers was made by the Census Bureau. The undercount of the minorities combined with the high growth rate for Hispanics in Idaho indicates that any dilution calculation based upon House Bill 760 grossly underestimates the actual dilution occurring to the applicable district.

The legislature of Idaho has 35 single member senate districts and two at large house seats for every senate district. While the minorities are not a majority in any district, the minorities are of an appreciable size to influence the outcome of elections if the boundaries had not been drawn to dilute their influence. For example, under House Bill 760 the Hispanics constitute only 20.05% in Canyon County District 12. A properly drawn plan would increase their influence to 26.490% for the Senate seat and 32.579% for the House seat.

Historically, the Hispanics and Native Americans have been disenfranchised from the political process in Idaho as indicated by the affidavits

filed by the Plaintiffs. Additionally, recent elections support the conclusion that Hispanics and Native Americans are politically cohesive in their voting patterns. Further, the affidavits support the conclusion that Hispanics and Native Americans in Idaho continue to bear the effects of discrimination in areas such as education, employment, housing and health services which depresses their social-economic status and hinders their participation in the political process. The district boundaries established by House Bill 760 are invalid by reason of unlawful dilution and the reduction of Hispanic and Native American voting strength within the areas encompassed by Districts 10-12, 25 and 35 of House Bill 760.

The Plaintiffs challenged House Bill 760 as being in violation of the U.S. Constitution, the Idaho Constitution and the Voting Rights Act. The panel of three judges determined that the three-prong test of *Thornburg v. Gingles, supra,* applies to minority influence dilution claims. Since the parties stipulated that the Hispanics and Native Americans cannot constitute a majority in any single senate or house district, the first prong of the *Gingles* test could not be

satisfied. Therefore, summary judgment was granted in favor of the Defendants.

Plaintiffs maintain that the three preconditions of *Gingles* do not apply in a minority influence dilution or impairment claim. Instead, the test is whether or not the minority is large enough to influence the outcome of an election, and whether they can show under the Voting Rights Act's totality of the circumstances analysis that the minorities are disenfranchised from the political process. Beginning with *Gingles* and including the most recent opinions by this Court in *Growe v. Emison*, _____ U.S. _____, 113 S.Ct. 1075 (1993) and *Voinovich v. Quilter*, _____ U.S. _____, 113 S.Ct. 1149 (1993), the threshold requirements, if any, for a minority influence dilution claim are anything but clear cut. The Voting Rights Act requires the minority to satisfy the "totality of the circumstances" test instead of the three-prong test of *Gingles*.

The Plaintiffs' appeal centers on the argument that the Voting Rights Act is to be broadly interpreted and for the Court to require a minority to constitute a majority in a district before that minority is

protected by the Voting Rights Act creates a situation where protection is only granted to minorities only when the minority no longer needs that protection. This Court has acknowledged in *Chisom v. Roemer*, ____ U.S. ____, 111 S. Ct. 2354 (1991) that a politically cohesive minority can influence the outcome of an election. Therefore, if the Plaintiffs can show under a totality of the circumstances analysis that legislative boundaries in House Bill 760 dilute the minority's ability to influence elections, the Plaintiffs have stated a cognizable claim under the Voting Rights Act. The Plaintiffs should be allowed their day in court to prove that under a totality of the circumstances analysis the minority's voting rights are being diluted and the Summary Judgment of the district court should be reversed.

THE QUESTION IS SUBSTANTIAL

The prerequisites, if any, for a true minority influence dilution claim have not yet been articulated by this Court, because the issue has not been squarely presented. This case squarely presents that issue.

CONCLUSION

This appeal should be heard by the Court to clarify for all minorities the application of the Voting Rights Act to minority influence dilution claims.

RESPECTFULLY SUBMITTED this 4th day of ~~July~~ August, 1993.

/s/

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APPENDIX

A. Order Granting Defendant's Motion for Summary Judgment.

B. Notice of Appeal.

C. Order from the U.S. Court of Appeals for the Ninth Circuit transferring jurisdiction to the United States Supreme Court.

D. Constitutional provisions and statutes involved in the case.

1. U.S. CONST. amend. XIV
2. U.S. CONST. amend. XV
3. I.D. CONST. art. I § 2
4. I.D. CONST. art. III §§ 2-5
5. I.D. CONST. art. VI §§ 1-7
6. 28 U.S.C. § 1253 (1988)
7. 28 U.S.C. § 1331 (1988)
8. 28 U.S.C. § 1343(4) (1988)
9. 28 U.S.C. § 1631 (1988)
10. 28 U.S.C. § 2201 (1988)
11. 28 U.S.C. § 2202 (1988)
12. 28 U.S.C. § 2284 (1988)
13. 42 U.S.C. § 1973 (1988)
14. 42 U.S.C. § 1973*l* (1988)
15. 42 U.S.C. § 1983 (1988)
16. 42 U.S.C. § 1988 (1988)
17. Idaho Code § 67-202 (Supp. 1992)

APPENDIX A
ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

IDAHO HISPANIC CAUCUS INC., an Idaho nonprofit corporation; HUMBERTO FUENTES, RUDY PEÑA, ERNESTO SANCHEZ, MARIA NAVA, LOU RODRIGUEZ, JUAN VASQUEZ, MARIA SALAZAR, FRANCIE KATSILOMETES, and GLADYS ESQUIBEL, as individuals and representative citizens of the State of Idaho,	)	No. CIV-92-0176-S-HLR
Plaintiffs,	)	ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
vs.	)	Filed December 10, 1992
THE STATE OF IDAHO, THE HONORABLE CECIL ANDRUS, governor of the state of Idaho, THE HOUSE OF REPRESENTATIVES OF THE STATE OF IDAHO;	)	

THE SENATE OF THE STATE OF IDAHO, and THE HONORABLE PETER T. CENARRUSA, Secretary of State of the State of Idaho,

Defendants.

This action challenges Idaho's recently adopted reapportionment plan as violative of the Idaho and United States Constitutions and the Voting Rights Act of 1965, as amended in 1982. 42 U.S.C. § 1973 (Supp. 1992). Upon the plaintiffs' request, a three-judge panel of the district court--the Honorable Jerome Farris, Circuit Judge, the Honorable Marion J. Callister, Senior District Judge, and the Honorable Alan A. McDonald, District Judge--was convened pursuant to 28 U.S.C. § 2284 (1978). Plaintiffs are represented by Robert C. Huntley and Nancy A. Baskin. Attorney General Larry Echohawk and Deputy Attorneys General Francis P. Walker and William A. von Tagen represent the defendants.

The matter comes before the court on the defendants' Motion for Summary Judgment. For the

reasons set forth below, the defendants' motion is granted.

GENERAL FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Every ten years the Idaho Legislature must reapportion itself. Idaho Const. art. III, § 4. In accordance with this constitutional mandate, the Idaho Legislature passed a reapportionment plan known as House Bill 760 on February 28, 1992. The plan received bipartisan support. Governor Cecil Andrus signed it into law on March 2, 1992.[1] House Bill 760, now codified as Idaho Code § 67-202, reduces the number of districts from 42 to 35 and provides for

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[1]Governor Andrus vetoed an earlier reapportionment plan, Senate Bill 1269, on February 11, 1992, because it gerrymandered to protect incumbents and failed to garner bipartisan support. Defendants' Mem. in Supp. of Mot. Summ. J., Ex. D. Senate Bill 1269 received no support from Democratic legislators. Governor Andrus indicated in his veto message that he would not sign a reapportionment bill which did not receive bipartisan support.

one state senator and two state representatives for each district.[2]

On May 5, 1992, the Idaho Hispanic Caucus, Inc. and several Hispanic individuals,[3] individually and as representative citizens of the State of Idaho, filed a complaint in the United States District Court for the District of Idaho challenging the constitutional and statutory validity of H.B. 760. The plaintiffs allege that the way the legislative boundaries are drawn in Districts 10-12, 25 and 35 impermissibly dilutes the ability of Hispanics and Native Americans to influence the election process, and thereby violates the Voting Rights Act and the state and federal Constitutions. According to plaintiffs, H.B. 760 divides the minority groups at their point of highest concentration (i.e., Canyon County) and minimizes the

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[2]The Idaho Constitution authorizes the apportionment of the legislature to "not less than 30 nor more than 35 legislative districts . . . as may be provided by law." Idaho Const., art. 3, § 4.

[3]At the hearing on the defendants' summary judgment motion, this court granted the plaintiffs' motion to amend the complaint to include Native Americans as additional parties.

minority's ability to influence the outcome of an election. Pls' Mem. Opp'n to Mot. Summ. J., filed July 27, 1992, at 16.

The plaintiffs also claim that the plan is the product of unconstitutional political gerrymandering and incumbent protection. The plaintiffs argue that the use of multimember districts dilutes Hispanic and Native American voting strength in Canyon County, Magic Valley, and the Pocatello area in violation of section 2 of the Voting Rights Act. Since the representatives are elected by the majority, plaintiffs contend that Idaho's multimember districts dilute the minority vote by submerging geographically compact minority groups in a white majority. The multimember districts allegedly thwart the ability of minorities to participate in the political process and to elect candidates of their choice. Complaint for Declaratory Judgment, Injunction & Other Relief, filed May 5, 1992, at 9.

To remedy these problems, plaintiffs essentially propose new boundaries for Districts 10, 11 and 12 and two house subdistricts each in Senate Districts

12, 25 and 35. *Id.* at 17.[4] Plaintiffs claim that "[a]lthough the single-member districts may not ensure that a Hispanic or Native American will be elected, the subdistricts will allow the Hispanics and Native Americans to influence election outcomes and to elect candidates sensitive and responsive to the needs and issues of the minorities." *Id.* at 10.

Defendants deny that Districts 10-12, 25 and 35 unconstitutionally dilute Hispanic and Native American voting strength. Defendants admit that

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[4]Specifically, the plaintiffs ask that the court do the following: (1) declare the reapportionment scheme under House Bill 760 unconstitutional and/or in violation of the Voting Rights Act; (2) enter an injunction preventing elections under the scheme for any further elections; (3) amend the existing plan by drawing new boundaries for Districts 10, 11 and 12, and providing two House Subdistricts each in Senate Districts 12, 25 and 35, or adopt a judicial reapportionment plan which: (a) does not dilute the ability of minority groups in Idaho to influence the political process, (b) maximizes the political participation of the Hispanic population, and (c) satisfies the requirements of the Voting Rights Act, the United States Constitution and the Idaho Constitution; (4) provide that the court's plan will be implemented only if the 1993 Legislature fails to enact its own plan providing for substantially similar minority influence districts; and (5) award attorney's fees and costs. *See* Complaint, filed May 5, 1992, at 15-18 and Pls' Mem. Opp'n to Mot. Summ. J., filed July 27, 1992, at 22-23.

Hispanic populations in Idaho are concentrated in Canyon County, Magic Valley, and the Pocatello area, but deny that plaintiffs are entitled to House subdistricts. Defendants concede that the reapportionment plan is not perfect and may not please everyone; however, they maintain that the plan was drawn with the rights of minorities in mind and that it received the necessary bipartisan support of the legislature.

GENERAL LEGAL PRINCIPLES BEARING ON THIS ACTION

We find it necessary to review the major authorities bearing on voting rights prior to addressing the merits of the parties' arguments.

1. The One Person/One Vote Requirement of Reynolds v. Sims.

Legislative districts must be drawn so that populations of each district are as equal as practicable. In Reynolds v. Sims, 377 U.S. 533 (1964), the famous "one person/one vote" case, the Court held that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Id.* at

568. Thereafter, in Brown v. Thomson, 462 U.S. 835 (1983), the Court acknowledged that its holding in Reynolds v. Sims "requires only 'that a State make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable,' for 'it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters.'" *Id.* at 842 (*quoting* Reynolds v. Sims, 377 U.S. 533, 577 (1964)). The Court concluded that "an apportionment plan with a maximum population deviation under 10% falls within [the] category of minor deviations" insufficient to make out a prima facia case of discrimination, but that "a plan with larger disparities in population . . . creates a prima facia case of discrimination and therefore must be justified by the State." *Id.* at 842-43 (citations omitted).

Numerically, at least, the Idaho reapportionment plan does not appear to violate the Constitution. Based on the figures available to the legislature at the time of reapportionment, Idaho had a population of 1,006,749 persons. Defs.' Mem. Supp. Mot. Summ. J., filed July 2, 1992, Ex. A. Given a

35-district legislature, the ideal population for each district would be 28,784 persons. *Id.* As a result of House Bill 760, District 10 is the most heavily populated district with a population of 30,194 and a relative deviation of 4.97 percent; and the least populated district is District 22, with a population of 27,349 and a relative deviation of 4.91 percent. *Id.* Given those figures, Idaho's plan contains 9.88 percent deviation which is rounded to 9.9 percent.[5] The plan is not facially unconstitutional.

2. Section 2 of the Voting Rights Act and the Impact of Thornburg v. Gingles.

Section 2 of the Voting Rights Act prohibits the imposition of any voting practice or procedure which denies or abridges the right of any citizen of the

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[5]To arrive at this figure for total population deviation, one would identify the ideal population for a district, subtract the ideal population from the population of the largest district, and divide by the ideal figure to get a population deviation percentage. Then, repeat the process for the smallest district and, since that number will be a negative number, one would take the absolute value of the percentage reached. Add the population deviation figure arrived at for the largest district to the figure reached for the smallest district and the result is the "total population deviation," which is sometimes referred to as "the range."

United States to vote on account of race or color. 42 U.S.C.S. § 1973(a) (Law. Co-op. 1986 & Supp. 1992). In 1980, a plurality of the Supreme Court held that proof of discriminatory intent was necessary to establish a vote dilution claim under the Fourteenth and Fifteenth Amendments *and* Section 2 of the Voting Rights Act. Mobile v. Bolden, 446 U.S. 55 (1980).

In response to the Supreme Court's decision in Bolden, Congress amended the Voting Rights Act in 1982, adding language which clearly indicates that a violation of the Act can be proved by showing either intentional discrimination in the drawing of district lines or discriminatory *effect* alone.[6] Congress

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[6]Section 2 of the Voting Rights Act, as amended, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 USCS § 1973(f)(2)], as provided in subsection (b).

intended to restore the "results test" as the proper legal standard governing voting discrimination cases. Thornburg v. Gingles, 478 U.S. 30, 44 n.8 (1986). "Under the 'results test,' plaintiffs are not required to demonstrate that the challenged electoral law or structure was designed or maintained for a discriminatory purpose." *Id.*

Thornburg v. Gingles, 478 U.S. 30 (1986), was the first Supreme Court case to interpret the 1982 amendment to section 2 of the Voting Rights Act, and

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> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C.S. § 1973 (Law. Co-op. 1986 & Supp. 1992).

it remains the leading case in this area. In Gingles, the Court found that Congress had the power under the Fourteenth and Fifteenth Amendments to implement a results test for vote dilution under the Voting Rights Act. Under the amended Act, plaintiffs need only show that "under the totality of the circumstances" minorities are being denied an equal opportunity to participate in the electoral process and to elect candidates of their choice.

Gingles involved a challenge to a multimember district scheme for electing representatives to the North Carolina Legislature. Registered black voters in Gingles contended that the use of multimember, rather than single-member, districts in the contested jurisdictions diluted their votes by submerging them in a white majority. The districts thus impaired their ability to elect representatives of their choice. *Id.* at 46. The Court stated that it "has long recognized that multimember districts and at-large voting schemes may '"operate to minimize or cancel out the voting strength of racial [minorities in] the voting population,"' [because] . . . where minority and majority voters consistently prefer different

candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters." *Id.* at 47-48 (citations and footnotes omitted). Notwithstanding this seemingly harsh reality, the Court explained that "[m]ultimember districts and at-large election schemes, however, are not per se violative of minority voters' rights." *Id.* at 48 (citations omitted).

In Gingles, the district court applied the "totality of the circumstances" test and concluded that the multimember districts established in North Carolina violated section 2. Gingles v. Edmisten, 590 F. Supp. 345 (E.D.N.C. 1984) (three-judge panel) (*aff'd in part and rev'd in part sub nom.* Thornburg v. Gingles, 478 U.S. 30 (1986)). After noting that Blacks were "sufficient in numbers and contiguity to constitute effective voting majorities in single-member districts," *id.* at 358, the district court found that North Carolina had officially discriminated against Blacks with respect to their right to vote; that Blacks had suffered historically from discrimination in education, housing, employment and health services; that North Carolina maintained a majority vote

requirement; that white candidates had encouraged voting along color lines by appealing to racial prejudice; that very few Blacks had ever held public office in the state; and that voting in the challenged districts was racially polarized. *Id.* at 359-72.

On direct appeal, the Supreme Court agreed that the factors considered by the district court (and contained within the Senate Judiciary Report accompanying the bill that amended section 2)[7] were

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[7]The factors adopted by Congress were those enunciated by the Supreme Court in White v. Ragester, 412 U.S. 755, 769 (1973) and by the Fifth Circuit in Zimmer v. McKeithen, 485 F.2d 1297, 1306 (5th Cir. 1973). Those factors include:

1. The extent of any history of official discrimination touching the right of minorities to register, vote, or participate in the political process;
2. The extent to which voting in the elections is racially polarized;
3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. Whether members of the minority group have been denied access to the candidate slating process;
5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

certainly "relevant to a claim of vote dilution through submergence in multimember districts . . .." Thornburg v. Gingles, 478 U.S. at 48. However, in construing the operation of section 2 claims, the court limited the use of such factors and concluded that "*unless* there is a conjunction of the following circumstances, the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice." *Id.* (emphasis added). The circumstances and/or preconditions to which the Court referred have since become known as the "three-prong test" of Thornburg v. Gingles, and include the following: (1) the minority group must demonstrate that it is sufficiently large and geographically compact to constitute a majority in a

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6. Whether political campaigns have been characterized by overt or subtle racial appeals;
7. The extent to which minorities have been elected to public office in the jurisdiction;
8. Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of minorities;
9. Whether the policy underlying the state or political subdivision's voting practice or procedure is tenuous.

S.Rep.No. 417, 97th Cong., 2d Sess., pt. 1, at 28-29, *reprinted in* 1982 U.S.Code Cong. & Admin.News at 206-07.

single-member district; (2) the minority group must show that it is politically cohesive; and (3) the minority must demonstrate that the white majority votes sufficiently as a bloc to enable it--in the absence of special circumstances, such as the minority candidate running unopposed--usually to defeat the minority's preferred candidate. *Id.*

The Supreme Court explained the rationale for the first precondition--the requirement that a minority group show that it is sufficiently large and geographically compact to constitute a majority in a single member district--as follows:

> [u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice. The single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected. Thus, if the minority group is spread evenly throughout a multimember district, or if, although geographically compact, the minority group is so small in relation to the surrounding white population that it

> could not constitute a majority in a single-member district, these minority voters cannot maintain that they would have been able to elect representatives of their choice in the absence of the multimember electoral structure.

Gingles, 478 F.2d at 50 n.17.

Before this Court there is much debate about the binding effect of the Gingles' three-prong test and, in particular, the preclusive effect of the first prong as it applies to plaintiffs. However, in the absence of "intentional discrimination," plaintiffs must meet the three-prong test before we will explore their claims under a "totality of the circumstances" analysis. *See, e.g.*, McNeil v. Springfield Park District, 851 F.2d 937, 942 (7th Cir. 1988) (finding that minority groups must meet the three-prong test of Gingles to survive a motion for summary judgment), *cert. denied*, 490 U.S. 1031 (1989).

The Ninth Circuit has directly assessed the use of the "brightline test" of Gingles. Absent allegations of intentional discrimination, courts must, "[a]s a *preliminary* matter . . . " require plaintiffs "to show the existence of [the] three threshold elements" delineated in Gingles. Romero v. City of Pomona, 883

F.2d 1418, 1422 (9th Cir. 1989) (emphasis added). *See* Garza v. County of Los Angeles, 918 F.2d 763, 771 (9th Cir. 1990) (distinguishing the appropriateness of applying the first prong of Gingles to claims based on disparate impact under a seemingly neutral electoral scheme as opposed to claims based on evidence of intentional discrimination), *cert. denied*, ___ U. S. ____, 111 S.Ct. 681, 112 L.Ed.2d 673 (1991).

The Ninth Circuit noted in Romero v. City of Pomona that "Thornburg did not announce such a fundamental, unanticipated, or sweeping change in the law" pertaining to vote dilution claims. Romero, 883 F.2d at 1423. In particular, as to the first prong of Gingles, the Ninth Circuit has concluded that the Court's position "did not materially alter the burden of proving a section 2 claim," since "cases prior to [Gingles] held that no section 2 claim could be brought unless plaintiffs demonstrated that the minority group was capable of forming a majority of voters in a single district." *Id.* at 1423-24 *(citing* Latino Political Action Comm. v. City of Boston, 609 F. Supp. 739, 746-47 (D.Mass. 1985), *aff'd*, 784 F.2d 409 (1st Cir. 1986); Gingles v. Edmisten, 590 F. Supp. at 381 n.3.

Moreover, in a footnote to its discussion of the first prong in Gingles, the appellate court indicated: "We are aware of no successful section 2 voting rights claim ever made without a showing that the minority group was capable of a majority vote in a designated single district." Romero v. City of Pomona, 883 F.2d at 1424 n.7.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Rule 56 of the Federal Rules of Civil Procedure provides, in pertinent part, that judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Rule 56 mandates summary judgment if the non-moving party fails to make a showing sufficient to establish the existence of an element which is essential to his case and upon which he will bear the burden of proof at trial. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). If the non-moving party

fails to make such a showing on any essential element of his case, "there can be no 'genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 323.

Defendants contend that throughout the reapportionment process the legislature was informed and mindful of the legal criteria for enacting a constitutional plan and that the concerns of Hispanic and Native American populations were specifically taken into account. *See* Defs.' Mem. Supp. Summ. J., filed July 2, 1992, Ex. B and C; and Aff. of Myran H. Schlechte, filed July 2, 1992. Defendants candidly concede that "Idaho's reapportionment plan may not be ideal from any single person or group's perspective"; however, they argue that the plan does not violate the Constitution or Voting Rights Act. Defs.' Mem. Supp. Mot. Summ. J., filed July 2, 1992, at 19.

The defendants argue that they are entitled to summary judgment because the plaintiffs do not constitute large enough minority groups to bring a

challenge under the Voting Rights Act. Relying on the first threshold "precondition" set forth in Thornburg v. Gingles, 478 U.S. at 50-51, the defendants assert that "[p]laintiffs cannot, in any region in this state, constitute a majority within a single-member legislative district." Defs.' Mem. Supp. Mot. Summ. J., filed July 2, 1992, at 11. Specifically, defendants maintain that:

> Canyon County has the highest concentration of Hispanic population in Idaho. In reviewing the Census data used by the legislature in drafting H.B. 760, only one precinct in Canyon County contains a Hispanic majority. Precinct no. 62 has 959 Hispanic persons out of a total population of 1,829, or 52.43%. Precinct no. 7 contains the next highest percentage of Hispanic persons with 48.17%, or 1,134 out of 2,354 persons. Beyond these two precincts, the percentages in Canyon County of Hispanic population drops significantly. *See* Census data attached as Exhibit A to Affidavit of Myran H. Schlechte.

Id.

Defendants claim that the use of multimember districts is not an attempt to dilute the Hispanic vote.

And, finally, defendants argue that plaintiffs' political gerrymandering and incumbent retention claims are either irrelevant or do not support their claims of discrimination arising under the Voting Rights Act.

In response to defendants' claim that, however counted, plaintiffs do not constitute the requisite majority in any single-member district to launch a challenge under the Voting Rights Act, plaintiffs argue that "Hispanics and Native Americans are concentrated in three areas of the state in percentages large enough to permit them to *influence* elections." Pls.' Mem. Opp'n Mot. Summ. J., filed July 27, 1992 (emphasis added). Additionally, plaintiffs claim that the Hispanic population was seriously undercounted in the 1990 Census. Aff. of David Ripley, filed July 27, 1992, at 3.[8] Plaintiffs also claim that they, and the Hispanic minority group in particular, have been disenfranchised from the political process in Idaho

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[8]At paragraph 6 of the affidavit, Mr. Ripley states: "That a House sub-district in the senate district could be as high as 43% Hispanic in the year 2000 based on the actual Hispanic population of 1990 and the current growth trend." Ripley Affidavit, filed July 27, 1992, at 3.

and subject to institutional discrimination and racism in the areas of education, employment and criminal justice. *See* Aff. of Richard Baker, filed July 27, 1992.

Plaintiffs acknowledge the existence of the three-prong test from Gingles, but assert that the holding in Gingles was limited by the inclusion of footnote 12 wherein the court stated:

> The claim we address in this opinion is one in which the plaintiffs alleged and attempted to prove that their ability *to elect* the representatives of their choice was impaired by the selection of a multimember electoral structure. We have no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group that is not sufficiently large or compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability *to influence* elections.
>
> We note also that we have no occasion to consider whether the standards we apply to respondents' claim that multimember districts operate to dilute the vote of geographically cohesive minority groups that are large enough to constitute majorities in single-member

> districts and that are contained within the boundaries of the challenged multimember districts, are fully pertinent to other sorts of vote dilution claims, such as a claim alleging that the splitting of a large and geographically cohesive minority between two or more multimember or single-member districts resulted in the dilution of the minority vote.

Thornburg v. Gingles, 478 U.S. at 46 n.12.

Plaintiffs urge this court to recognize this action as an "'influence' vote dilution claim" and to allow plaintiffs to proceed to trial despite their inability to meet the first prong of Gingles. Plaintiffs reason that: "The right to vote is fundamental to freedom in our democratic society. *It seems unreasonable to think that minority rights would be protected under the Voting Rights Act only if the minority is a majority in the respective district*."

Pls.' Mem. Opp'n Mot. Summ. J., filed July 27, 1992, at 12.

Moreover, plaintiffs argue that "[a] plain reading of the Fifteenth Amendment to the

Constitution and the Voting Rights Act indicates that the protection of the Act is not limited to minorities which compromise a majority in a district." *Id.* Plaintiffs urge this court to look to the "totality of circumstances" as delineated in section 2 and to find that the preconditions of Gingles were merely set forth to be applied "in the interest of judicial economy and in the interest of clarity and uniformity *only* in those cases where a minority was able to constitute a majority in a single member district . . . ." *Id.* at 13 (emphasis added). In support of their position, plaintiffs rely on several cases which recognize that the preconditions of Gingles do not apply to *all* section 2 claims. *See* Armour v. Ohio, 775 F. Supp. 1044 (N.D. Ohio 1991); Emison v Growe, 782 F. Supp. 427 (D.Minn. 1992); Illinois Legislative Redistricting v. Lapaille, 782 F. Supp. 1272 (N.D.Ill. 1992); Wilson v. Eu, 823 P.2d 545 (Cal. 1992).

Plaintiffs also claim that the use of multimember districts in the State of Idaho is unconstitutional, and while they would have "no objection" to establishing single-member districts

throughout the state, at the very least they wish to have single-member districts established in the areas of Canyon County, Magic Valley, and Pocatello since these areas have high concentrations of minorities. Pls.' Mem. Opp'n Mot. Summ. J., filed July 27, 1992, at 18-19.

Finally, with respect to political gerrymandering and incumbent retention, plaintiffs concede that they "probably do not have a claim for declaring House Bill 760 unconstitutional." *Id.* at 19. Nevertheless, plaintiffs urge this court to consider these issues as they bear on establishing minority dilution under the "totality of the circumstances" criteria delineated in section 2 of the Voting Rights Act.

1. Applicability of the Gingles Three-Prong Test to Claims Alleging Dilution of Voting Influence

Plaintiffs urge this court to disregard the three prongs set forth in Gingles, and adopt the reasoning followed in the case of Armour v. State of Ohio, 775 F.Supp. 1044 (N.D. Ohio, 1991). In Armour, a three-judge panel concluded that Ohio's

apportionment plan, involving a House of Representatives composed exclusively of single-member districts, could be analyzed based on the "totality of the circumstances," despite the fact that plaintiffs could not meet the first prong of Gingles. *Id.* at 1050. The court placed emphasis on footnote 12 in Gingles, wherein "the Court expressly limited the application of these preconditions to situations in which plaintiffs were challenging *only* the multimember districting." Armour, 775 F. Supp. at 1051 (footnote omitted).

Unlike the minority group in Armour, plaintiffs in this case are not challenging single-member districting. Thus, although the approach discussed in Armour is arguably supported by footnote 12 in Gingles, that decision is not persuasive authority for disregarding the Gingles preconditions. After reviewing the decisions by other courts that have considered "influence" arguments similar to that raised here, we have found that the plaintiffs have overstated the "trend" in the courts to disavow the three-prong threshold test of Gingles.

In Hastert v. State Board of Elections, 777 F. Supp. 634 (N.D. Ill. 1991), a three-judge panel specifically criticized the Armour court for failing to "undertake any analysis of the statute or its legislative history that might support its holding. *Id.* at 652. The panel could find no reason "for waiving the minority voter majority requirement in single-member districts while preserving it in multi-member or at-large districts. *Id.* at 654. "The concerns animating the Gingles electoral majority precondition for multi-member cases---concerns of proof and relief---reside equally in the single member context." *Id.* The panel in Hastert construed footnote 12 merely "as an indication that the Court did not consider the impact of its holding as it related to other conceivable types of claims under § 2. *Id.* at 654 n.32. The Hastert court warned that:

> [R]ecognition of minority influence districts may raise at least as many issues as it would resolve. For example, in cases involving challenges to multi-member districts, courts have recognized that an unrestricted breach of the Gingles single-district majority

> precondition will likely open a Pandora's box of marginal Voting Rights Act claims by minority groups of all sizes.

Id. (*citing* McNeil v. Springfield Park Dist., 851 F.2d 937 (7th Cir. 1988); Skorepa v. Chula Vista, 723 F. Supp. 1384 (S.D.Cal. 1989); Armour v. Ohio, 775 F. Supp. at 1081-82 (Batchelder, J., dissenting)).

In McNeil v. Springfield Park District, 851 F.2d 937, 942 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989), the Seventh Circuit Court of Appeals affirmed a district court's decision granting summary judgment for defendants where plaintiffs raised arguments similar to those in the case at bar and failed to satisfy the "necessary preconditions" established by the Supreme Court in Gingles. The Seventh Circuit acknowledged that "[a]t least at first glance, a tension seems to exist between the Court's approach to voting rights claims and Congress's intent in amending section 2." McNeil v. Springfield Park District, 851 F.2d at 942. Nonetheless, the court was compelled to reject plaintiffs' argument that a court must explore the totality of the circumstances without first

determining whether the Gingles threshold criteria are met. *Id.* at 943.

> We cannot accept the appellants' contention that they can avoid the Gingles criteria by arguing that the multi-member districts impair their ability to influence elections. Given the Court's decision to draw a bright line for summary judgment purposes, it seems counterproductive to permit plaintiffs who cannot satisfy the threshold Gingles tests to make alternative claims that would obliterate the bright line. If allowed, the "ability to influence" claim would severely undermine whatever good purpose is served by the threshold factors.

Id. at 947.

The McNeil reasoning was adopted by a district court in this Circuit. Skorepa v. City of Chula Vista, 723 F. Supp. 1384 (S.D.Cal. 1989), which involved challenges by Hispanic citizens under section 2 of the Voting Rights Act and under the Fourteenth and Fifteenth Amendments to the United States Constitution. The defendants argued that the complaint should be dismissed because the plaintiffs could not meet the first condition of

Gingles. The court agreed and granted summary judgment for the defendants. The court expressly rejected plaintiffs' "influence" argument:

> The [Gingles] preconditions for "election" cases give courts a measurable and judicially manageable test for determining the existence of unlawful vote dilution. Absent the requirement for a district majority, every segment of the population, no matter how small, would have a claim under § 2. Accordingly, the Court [sic] finds that there exists no legally cognizable "influence" claim under § 2 that would require a lesser standard of proof than set forth in [Gingles].

Id. at 1392.

Plaintiffs acknowledge that they do not and cannot meet the first prong of Gingles because they do not constitute a majority within any single-member legislative district in Idaho.[9] However, plaintiffs urge this court to rely on

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[9]Not only have plaintiffs failed to establish that they constitute a majority in any single-member district, they have essentially conceded that, according to the plaintiffs' own projections based on the actual Hispanic population of 1990 and the current growth trend, the minority group will be insufficient to constitute a majority in any single-member house subdistrict in the State of Idaho even in the year 2000. Ripley Aff., filed July 27, 1992, at ¶ 6.

footnote 12 of Gingles and the reasoning of other courts that have arguably been receptive to "influence" claims alleging vote dilution. Plaintiffs do not suggest that the Gingles preconditions are not applicable to any section 2 challenges; rather, they argue that the preconditions should only be applied in those actions where a minority is able to constitute a majority of a single-member district. Pls.' Mem. Opp'n Mot. Summ. J., filed July 27, 1992, at 13.

If the panel accepted plaintiffs' reasoning, prong one of Gingles would only apply in circumstances where it could be satisfied, and would effectively be rendered meaningless in all other circumstances. Gingles is binding precedent. We must follow the three-part test articulated in Gingles. The Seventh Circuit Court of Appeals recognized this obligation in McNeil v. Springfield Park District, 851 F.2d 937, 947 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989). The Supreme Court denied certiorari. Had the Supreme Court wished to revisit the applicability of the three prongs in Gingles or to elaborate on Justice

Brennan's footnote 12, it had the opportunity to do so.

If plaintiffs had to show only that the reapportionment plan impaired their ability to influence elections, courts might be flooded by the most marginal section 2 claims. McNeil, 851 F.2d at 947.

CONCLUSION

The record suggests that, while the result may not be perfect and may not please 100 percent of the population, Idaho's legislative redistricting plan attempted to accommodate, rather than discriminate against, the concerns of the Hispanic and Native American minority groups. There is no evidence of intentional discrimination. We cannot skip the three-prong test of Gingles and undertake a "totality of the circumstances" analysis.

Because the plaintiffs simply cannot get past the first prong of Gingles, the court is obliged to enter summary judgment in favor of the defendants.

Accordingly, IT IS HEREBY ORDERED that the defendants' motion for summary judgment is

GRANTED. Judgment is entered in favor of the defendants and against the plaintiffs.

IT IS SO ORDERED. The Clerk is directed to enter this order and forward copies to counsel. DATED this 30th day of November, 1992.

JEROME FARRIS
United States Circuit Judge

MARION J. CALLISTER
Senior United States
District Judge

ALAN A. McDONALD
United States District Judge

MARION J. CALLISTER, Senior District Judge, concurring in the opinion:

I am in full agreement with all aspects of the decision of this panel, but write separately to examine very briefly the rise and fall of Gingles' footnote 12.

As discussed in our opinion, Justice Brennan used footnote 12 to leave open the question whether an influence impairment claim would be cognizable under § 2 of the Voting Rights Act. Although Justice Brennan was reserving judgment, the very existence of the footnote indicated that he might be willing to carve out an exception to the three-prong test, and analyze influence-impairment claims under some other standard. Justices White, Stevens, Marshall, and Blackmun joined Justice Brennan in this part of the opinion.

Justice O'Connor, joined by the Chief Justice, and Justices Powell and Rehnquist, wrote a concurrence that addressed Justice Brennan's footnote 12 in a footnote of their own. Gingles, 478 U.S. at 90 n. 1. In their footnote, the concurrence questioned whether the first prong of the Gingles' test is required by § 2. Gingles, 478 U.S. at 90 n.1 The concurrence then goes on to criticize an aspect of Justice Brennan's reasoning, and in doing so suggests that a minority group tha did not satisfy Gingles' first prong might nevertheless have a cognizable claim if it could establish that white

cross-over voters would provide the extra votes necessary to elect the minority candidates. Id. The language of Justice O'Connor's concurrence indicates some receptivity to influence-impairment claims. See Pamela S. Karlan, Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation, 24 Harv. C.R.-C.L. L. Rev. 173 at n.105 (1989) (characterizing Justice O'Connor's concurrence as "suggesting that [influence-impairment] claims should probably be cognizable.").

In fact, a fair reading of Gingles is that all nine Justices might entertain an influence-impairment claim if it was presented directly to them. That direct presentation was made three years later when African-American voters appealed a Seventh Circuit decision holding that influence-impairment claims were not cognizable under § 2. McNeil v. Springfield Park District, 851 F.2d 937 (7th Cir. 1988). Rather surprisingly, the Court denied certiorari, and did so without a dissent. McNeil v. Springfield Park District, 490 U.S. 1031 (1989). Was footnote 12

abandoned by the entire court, including its author? Or did we read too much into the Court's footnotes? Whatever the case, the Court's disposition of McNeil reveals the continuing vitality of the three-prong test.

With these additional comments, I join fully in the decision of the panel.

APPENDIX B
ORDER FROM THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT TRANSFERRING JURISDICTION TO THE UNITED STATES SUPREME COURT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IDAHO HISPANIC CAUCUS, et al.,	)	No. 93-35032
Plaintiffs-Appellants,	)	DC# CV-92-00176-HLR Idaho (Boise)
vs.	)	
STATE OF IDAHO, et al.,	)	ORDER
	)	Filed
Defendants-Appellees.	)	June 25, 1993

Before: CANBY, FERNANDEZ and T.G. NELSON, Circuit Judges

Appellees' motion to dismiss the appeal for lack of jurisdiction is granted. See 28 U.S.C. § 1235; Alexander v. Fioto, 430 U.S. 634 (1977) (United States Supreme Court has jurisdiction over

appeal from properly convened three-judge panel). This appeal shall be transferred to the United States Supreme Court. See 28 U.S.C. § 1631.

APPENDIX C
NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

IDAHO HISPANIC CAUCUS INC., an Idaho nonprofit corporation; HUMBERTO FUENTES, RUDY PEÑA, ERNESTO SANCHEZ, MARIA NAVA, LOU RODRIGUEZ, JUAN VASQUEZ, MARIA SALAZAR, FRANCIE KATSILOMETES, and GLADYS ESQUIBEL, as individuals and representative citizens of the State of Idaho,	)	No.CIV-92-0176-S-HLR
Plaintiffs,	)	NOTICE OF APPEAL Filed January 7, 1993
vs.	)	
THE STATE OF IDAHO, THE HONORABLE CECIL ANDRUS, governor of the state of Idaho, THE HOUSE OF REPRESENTATIVES OF THE STATE OF IDAHO;	)	

THE SENATE OF THE STATE OF IDAHO, and THE HONORABLE PETER T. CENARRUSA, Secretary of State of the State of Idaho,

Defendants.

Robert C. Huntley
Nancy A. Baskin
Givens, Pursley, Webb & Huntley
227 N. 6th Street
P.O. Box 2720
Boise, ID 83701
(208) 342-6571
Attorneys for Plaintiffs

Plaintiffs, by and through their counsel of record, hereby give notice of their appeal to the United States Court of Appeals for the Ninth Circuit from the Order Granting Defendants' Motion for Summary Judgment, filed December 10, 1992.

DATED this _____ day of January, 1993.
GIVENS, PURSLEY, WEBB & HUNTLEY

Robert C. Huntley
Nancy A. Baskin
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of January, 1993, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Larry Echohawk
Attorney General
David G. High
Francis P. Walker
William A. von Tagen
Statehouse, Room 210
Boise, Idaho 83720

_____ HAND DELIVERED
_____ U.S. MAIL
_____ OVERNIGHT MAIL
_____ TELECOPY (FAX)

_____
Nancy A. Baskin

APPENDIX D
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

U.S. CONST. amend. XIV

§ 1. [Citizenship -- Due process of law -- Equal protection.] -- All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2. [Representatives -- Power to reduce apportionment.] -- Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis

of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

§ 3. [Disqualification to hold office.] -- No person shall be a senator or representative in congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

§ 5. [Power to enforce amendment.] -- The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XV

§ 1. [Right of citizens to vote -- Race or color not to disqualify.] -- The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on

account of race, color, or previous condition of servitude.

§ 2. [Power to enforce amendment.] -- The congress shall have power to enforce this article by appropriate legislation.

I.D. CONST. art. I § 2

§ 2. Political power inherent in the people. -- All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform or abolish the same whenever they may deem it necessary; and no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the legislature.

I.D. CONST. art. III §§ 2-5

§ 2. Membership of house and senate. -- Following the decennial census of 1990 and in each legislature thereafter, the senate shall consist of not less than thirty nor more than thirty-five members. The legislature may fix the number of members of the house of representatives at not more than two times as many representatives as there are senators. The senators and representatives shall be chosen by the electors of the respective counties or districts into which the state may, from time to time, be divided by law.

§ 3. Term of office. -- The senators and representatives shall be elected for the term of two

(2) years, from and after the first day of December next following the general election.

§ 4. Apportionment of legislature. -- The members of the legislature following the decennial census of 1990 and each legislature thereafter shall be apportioned to not less than thirty nor more than thirty-five legislative districts of the state as may be provided by law.

§ 5. Senatorial and representative districts. -- A senatorial or representative district, when more than one county shall constitute the same, shall be composed of contiguous counties, and a county may be divided in creating districts only to the extent it is reasonably determined by statute that counties must be divided to create senatorial and representative districts which comply with the constitution of the United States. A county may be divided into more than one legislative district when districts are wholly contained within a single county. No floterial district shall be created. Multi-member districts may be created in any district composed of more than one county only to the extent that two representatives may be elected from a district from which one senator is elected. The provisions of this section shall apply to any apportionment adopted following the 1990 decennial census.

I.D. CONST. art. VI §§ 1-7

§ 1. Secret ballot guaranteed. -- All elections by the people must be by ballot. An absolutely secret ballot is hereby guaranteed, and it shall be the duty of the legislature to enact such laws as shall carry this section into effect.

§ 2. Qualifications of electors. -- Every male or female citizen of the United States, eighteen years old, who has resided in this state and in the county were he or she offers to vote for the period of time provided by law, if registered as provided by law, is a qualified elector.

§ 3. Disqualification of certain persons. -- No person is permitted to vote, serve as a juror, or hold any civil office who is under guardianship, who has, at any place, been convicted of a felony, and who has not been restored to the rights of citizenship, or who, at the time of such election, is confined in prison on conviction of a criminal offense.

§ 4. Legislature may prescribe additional qualifications. -- The legislature may prescribe qualifications, limitations, and conditions for the right of suffrage, additional to those prescribe in this article, but shall never annul any of the provisions in this article contained.

§ 5. Residence for voting purposes not lost or gained. -- For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in

the service of this state, or of the United States, nor while engaged in the navigation of the waters of this state or of the United States, nor while a student of any institution of learning, nor while kept at any alms house or other asylum at the public expense.

§ 6. Recall of officers authorized. -- Every public officer in the state of Idaho, excepting the judicial officers, is subject to recall by the legal voters of the state or of the electoral district from which he is elected. The legislature shall pass the necessary laws to carry this provision into effect.

§ 7. Nonpartisan selection of Supreme and district judges. -- The selection of justices of the Supreme Court and district judges shall be nonpartisan. The legislature shall provide for their nomination and election, but candidates for the offices of justice of the Supreme Court and district judge shall not be nominated nor endorsed by any political party and their names shall not appear on any political party ticket, nor be accompanied on the ballot by any political party designation.

28 U.S.C. § 1253 (1988)

§ 1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court for an order granting or denying, after notice and hearing, an

interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c. 646, 62 Stat. 928.
28 U.S.C. § 1331 (1988)

28 U.S.C. § 1331 (1988)

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343(4) (1988)

§ 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which

he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, or any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purpose of this section --

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 1631 (1988)

§ 1631. Transfer to cure want of jurisdiction

Whenever a civil action is filed in a court, as defined in section 610 of this title or an appeal, including a petition for review of administrative

action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it was transferred. 28 U.S.C. § 1631 (1988)

28 U.S.C. § 2201 (1988)

§ 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of Canadian merchandise, as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Foods, Drug, and Cosmetic Act.

28 U.S.C. § 2202 (1988)

§ 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

28 U.S.C. § 2284 (1988)

§ 2284. Three-judge court; when required; composition; procedure

(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

(1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State.

(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.

42 U.S.C. § 1973 (1988)

§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973*l* (1988)

§ 1973*l*. Enforcement proceedings

(a) Criminal contempt

All cases of criminal contempt arising under the provisions of subchapters I-A to I-C of this chapter shall be governed by section 1995 of this title.

(b) Jurisdiction of courts for declaratory judgment, restraining orders, or temporary or permanent injunction

No court other than the District Court for the District of Columbia or a court of appeals in any proceeding under section 1973g of this title shall have jurisdiction to issue any declaratory judgment pursuant to section 1973b or 1973c of this title or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of subchapters I-A to I-C of this chapter or any action of any Federal officer or employee pursuant hereto.

(c) Definitions

(1) The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a

ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

(2) The term "political subdivision" shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.

(3) The term "language minorities" or "language minority group" means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.

(d) Subpoenas

In any action for a declaratory judgment brought pursuant to section 1973b or 1973c of this title, subpoenas for witnesses who are required to attend the District Court for the District of Columbia may be served in any judicial district of the United States: *Provided*, That no writ of subpena shall issue for witnesses without the District of Columbia at a greater distance than one hundred miles from the place of holding court without the permission of the District Court for the District of Columbia being first had upon proper application and cause shown.

(e) Attorney's fees

In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1983 (1988)

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suite in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988 (1988)

§ 1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Idaho Code § 67-202 (Supp. 1992)

67-202. Legislative districts - Senators elected - Representatives elected. - The state is divided into thirty-five (35) legislative districts. One

(1) senator shall be elected from each legislative district. Two (2) representatives shall be elected from each legislative district. The names, numbers and boundaries of the precincts and counties herein referred to in describing the area included within the legislative districts shall be as the same existed for the general election of 1988. The counties and precincts constituting the legislative district areas follow:

(1) Legislative District No. 1 shall include all the area contained within Boundary County; and all the area contained within the following precincts of Bonner County: No. 1, No. 2, No. 3, that portion of No. 4 lying east of Lake Pend Oreille, No. 5, No. 7, No. 8, No. 9, that portion of No. 10 lying north of the Pend Oreille River, No. 12, No. 14, No. 15, No. 16, No. 17, No. 18, No. 20, No. 21, No. 23, No. 24, that portion of No. 25 lying north of the Pend Oreille River, No. 26, No. 27, No. 28, No. 29, No. 30, No. 32, No. 33, that portion of No. 34 lying north and east of a line beginning at the intersection of Westmond Road with S. Sagle Road, west and south on Westmond Road to U.S. Highway 95, north on U.S. Highway 95 to Cocolalla Loop Road, then on Cocolalla Loop Road to Cocolalla Creek, then along Cocolalla Creek to the intersection with the western boundary of the precinct, No. 35 and No. 36.

(2) Legislative District No. 2 shall include all the area contained within the following precincts of Bonner County: that portion of No. 4 lying west of Lake Pend Oreille, No. 6, that portion of No. 10 lying south of the Pend Oreille River, No. 11, No. 13, No. 22, that portion of No. 25 lying south of the Pend Oreille River, No. 31, and that portion of No.

34 lying south and west of a line beginning at the intersection of Westmond Road with S. Sagle Road, west and south on Westmond Road to U.S. Highway 95, north on U.S. Highway 95 to Cocolalla Loop Road, then on Cocolalla Loop Road to Cocolalla Creek, then along Cocolalla Creek to the intersection with the western boundary of the precinct; and all the area contained within the following precincts of Kootenai County: that portion of No. 12 lying south of a line beginning at the intersection of East Pole Line Avenue and N. Heutter Road, west to N. Meyer Road, then south and west on N. Meyer Road and E. 16th Avenue to the Ross Point Rathdrum Highway, No. 13, No. 14, No. 15, No. 16, No. 17, No. 18, No. 19, No. 21, No. 22 and No. 30.

(3) Legislative District No. 3 shall include all the area contained within the following precincts of Kootenai County: No. 1, No. 3, No. 4, No. 5, No. 6, No. 7, No. 8, No. 10, No. 11, that portion of No. 12 lying north of a line beginning at the intersection of East Pole Line Avenue and N. Heutter Road, then west to N. Meyer Road, then south and west on N. Meyer Road and E. 16th Avenue to the Ross Point Rathdrum. Highway, that portion of No. 20 lying west of a line beginning at the intersection of Lancaster Road and N. Strahorn Road, south on N. Strahorn Road to E. Miles Road, east on E. Miles Road to N. Lakeview Drive, southwest on N. Lakeview Drive to E. Hayden Avenue, east on E. Hayden Avenue to the intersection with the city boundary of Hayden Lake before reaching East Street, then north and east following the city boundary to its extension into Hayden Lake, follow-

ing a nonvisible line through Hayden Lake to the mouth of Windy Bay, following Windy Creek and its extension to its intersection with the boundary of Precinct 31, and No. 32.

(4) Legislative District No. 4 shall include all the area contained within Shoshone County; all the area contained within the following precincts of Benewah County: Plummer and Tensed; and all of the area contained within the following precincts of Kootenai County: No. 2, No. 9, that portion of No. 20 lying east of a line beginning at the intersection of Lancaster Road and N. Strahorn Road, south on N. Strahorn Road to E. Miles Road, east on E. Miles Road to N. Lakeview Drive, southwest on N. Lakeview Drive to E. Hayden Avenue, east on E. Hayden Avenue to the intersection with the city boundary of Hayden Lake before reaching East Street, then north and east following the city boundary to its extension into Hayden Lake, following a nonvisible line through Hayden Lake to the mouth of Windy Bay, following Windy Creek and its extension to its intersection with the boundary of Precinct 31, No. 23, No. 24, No. 25, No. 26, No. 27, No. 28, No. 29 and No. 31.

(5) Legislative District No. 5 shall include all the area contained within the following precincts of Latah County: No. 1, No. 2, No. 3, No. 4, No. 5, No. 6, No. 7, No. 8, No. 9, No. 10, No. 11, No. 12, No. 13, No. 14, No. 15, No. 16, No. 17, No. 18, No. 19, No. 20, No. 21, No. 23, No. 24, No. 26, No. 27, No. 28, No. 29, No. 30 and No. 31.

(6) Legislative District No. 6 shall include all the area contained within the following precincts of Nez Perce County: Hatwai, Lewiston No. 1,

Lewiston No. 2, Lewiston No. 3, Lewiston No. 4, Lewiston No. 5, Lewiston No. 6, Lewiston No. 7, Lewiston No. 8, Lewiston No. 9, Lewiston No. 10, Lewiston No. 11, Lewiston No. 12, Lewiston No. 13, Lewiston No. 14, Lewiston No. 15, Lewiston No. 16, Lewiston No. 17, Lewiston No. 18, Lewiston No. 19, Lewiston No. 20, Lewiston No. 21, Lewiston No. 22, Lewiston No. 23, Lewiston No. 24, Lewiston No. 25, Lewiston No. 26, Rimrock, Tammany and Webb.

(7) Legislative District No. 7 shall include all the area contained within Clearwater and Lewis Counties; all the area contained within the following precincts of Benewah County: Benewah, Center, College, Emida, Fernwood, Santa, St. Joe, St. Maries and Townsite; all the area contained within the following precincts of Idaho County: Big Butte, Clearwater, Cottonwood No. 1, Cottonwood No. 2, Elk City, Ferdinand, Glover, Harpster, Joseph, Kamiah, Keuterville, Kooskia, Lowell, Stites and Woodland; all the area contained within the following precincts of Latah County: No. 22, No. 25 and No. 32; and all the area contained within the following precincts of Nez Perce County: Culdesac, Gifford, Lapwai, Leland, Lenore, Peck and Spaulding.

(8) Legislative District No. 8 shall include all the area contained within Adams, Boise and Valley Counties; all the area contained within the following precincts of Gem County: Bench, Brick, Butte, Central Emmett, Emerson, Montour/Sweet, North Emmett, Ola, South Emmett and West Emmett; and all the area contained within the following precincts of Idaho County: Fenn, Grangeville No. 1, Grangeville No. 2, Grangeville

No. 3, Grangeville No. 4, Grangeville No. 5, Greencreek, Pollock, Riggins, Slatecreek and Whitebird.

(9) Legislative District No. 9 shall include all the area contained within Payette and Washington Counties; and all the area contained within the following precincts of Gem County: Hanna, Letha and Lincoln.

(10) Legislative District No. 10 shall include all the area contained within the following precincts of Canyon County: No. 1, No. 4, No. 5, No. 6, No. 7, No. 8, No. 9, No. 10, No. 12, No. 15, No. 27, No. 29, No. 51, No. 52, No. 57 and No. 62.

(11) Legislative District No. 11 shall include all the area contained within the following precincts of Canyon County: No. 3, No. 18, No. 20, No. 22, No. 28, No. 32, No. 33, No. 34, No. 35, No. 36, No. 42, No. 54, No. 56, No. 58 and all of No. 59 except that block bounded by Crestview and New York Avenue and that block of No. 59 bounded by S. Florence Street.

(12) Legislative District No. 12 shall include all the area contained within the following precincts of Canyon County: No. 19, No. 21, No. 23, No. 25, No. 30, No. 38, No. 40, No. 44, No. 45, No. 46, No. 47, No. 49, No. 50, No. 55, that block of No. 59 bounded by Crestview and New York Avenue, and that block of No. 59 bounded by S. Florence Street, No. 60 and No. 61.

(13) Legislative District No. 13 shall include all the area contained within the following precincts of Ada County: No. 3, No. 4, No. 9, that portion of No. 12 lying east and north of Gowen Road and Pleasant Valley Road, No. 26, No. 27, No. 33, No.

35, No. 37, No. 45, No. 61, No. 62, No. 64, that portion of No. 69 lying east of Pleasant Valley Road, that portion of No. 79 lying east of Owyhee Street, No. 111, No. 113, No. 114 and No. 121.

(14) Legislative District No. 14 shall include all the area contained within the following precincts of Ada County: No. 29, No. 52, that portion of No. 63 lying west of Cloverdale Road, No. 65, No. 67, No. 71, No. 72, No. 73, No. 74, No. 88, that portion of No. 90 lying north of Amity Road, No. 94, No. 95, No. 96, No. 97, No. 98, No. 100, No. 105, No. 106, and that portion of No. 122 lying west of Eagle Road.

(15) Legislative District No. 15 shall include all the area contained within the following precincts of Ada County: No. 15, No. 16, No. 55, that portion of No. 63 lying east of Cloverdale Road, No. 75, No. 76, No. 86, No. 87, No. 104, No. 119, No. 120, that portion of No. 122 lying east of Eagle Road and No. 123.

(16) Legislative District No. 16 shall include all the area contained within the following precincts of Ada County: No. 8, that portion of No. 17 lying east of N. Milwaukee Street, No. 20, No. 23, No. 32, No. 38, No. 42, No. 49, No. 50, No. 54, No. 58, No. 59, No. 82, No. 89, No. 107, No. 117 and No. 118.

(17) Legislative District No. 17 shall include all the area contained within the following precincts of Ada County: No. 2, No. 10, No. 13, No. 14, that portion of No. 17 lying west of N. Milwaukee Street, No. 36, No. 39, No. 40, No. 43, No. 44, No. 48, No. 51, No. 53, No. 56, No. 57, No. 60, No. 78, that portion of No. 79 lying west of Owyhee Street, No. 81 and No. 84.

(18) Legislative District No. 18 shall include all the area contained within the following precincts of Ada County: that portion of No. 12 lying west of Gowen Road and Pleasant Valley Road, No. 66, No. 68, that portion of No. 69 lying west of Pleasant Valley Road, No. 70, No. 85, that portion of No. 90 lying south of Amity, No. 91, No. 92, No. 93, No. 99, No. 101, No. 102, No. 103, No. 109, No. 112 and No. 116.

(19) Legislative District No. 19 shall include all the area contained within the following precincts of Ada County: No. 1, No. 5, No. 6, No. 7, No. 11, No. 18, No. 19, No. 21, No. 22, No. 24, No. 25, No. 28, No. 30, No. 31, No. 34, No. 41, No. 46, No. 47, No. 77, No. 80, No. 83, No. 108, No. 110 and No. 115.

(20) Legislative District No. 20 shall include all the area contained within Owyhee County; and all the area contained within the following precincts of Elmore County: Chattin Flats, Glenns Ferry No. 1, Glenns Ferry No. 2, Hammett, Mayfield, Mountain Home No. 1, Mountain Home No. 2, Mountain Home No. 3, Mountain Home No. 4, Mountain Home No. 5, Mountain Home No. 6, Mountain Home No. 7 and Mountain Home No. 8.

(21) Legislative District No. 21 shall include all the area contained within Blaine, Camas and Lincoln Counties; all the area contained within the following precincts of Elmore County: Atlanta, Camas, King Hill, Pine and Prairie; and all the area contained within the following precincts of Gooding County: Bliss, Gooding East, Gooding Northeast, Gooding Northwest, Gooding West, Tuttle, Wendell East, Wendell Rural and Wendell West.

(22) Legislative District No. 22 shall include all the area contained within the following precincts of Gooding County: Hagerman, Orchard Valley and West Point; and all the area contained within the following precincts of Twin Falls County: Buhl No. 1, Buhl No. 2, Buhl No. 3, Buhl No. 4, Buhl No. 5, Buhl No. 6, Buhl No. 7, Castleford, Clover, Deep Creek, Filer No. 1, Filer No. 2, Filer No. 3, Maroa, Twin Falls No. 3, Twin Falls No. 4, Twin Falls No. 5, Twin Falls No. 7, Twin Falls No. 18, Twin Falls No. 20, Twin Falls No. 23 and Twin Falls No. 24.

(23) Legislative District No. 23 shall include all the area contained within the following precincts of Twin Falls County: Hansen, Hollister, Kimberly No. 1, Kimberly No. 2, Kimberly No. 3, Twin Falls No. 1, Twin Falls No. 2, Twin Falls No. 6, Twin Falls No. 8, Twin Falls No. 9, Twin Falls No. 10, Twin Falls No. 11, Twin Falls No. 12, Twin Falls No. 13, Twin Falls No. 14, Twin Falls No. 15, Twin Falls No. 16, Twin Falls No. 17, Twin Falls No. 19, Twin Falls No. 21 and Twin Falls No. 22.

(24) Legislative District No. 24 shall include all the area contained within Jerome County; and all the area contained within the following precincts of Minidoka County: Acequia, Emerson, Paul, Pioneer, Rupert No. 1, Rupert No. 3, that portion of Rupert No. 4 lying north of a line beginning at the intersection of State Highway No. 25 with the eastern boundary (the Snake River), then west on State Highway No. 25 to 100 East Road, then north on 100 East Road to 100 North Road, then west on 100 North Road to the precinct boundary, and Rupert No. 5.

(25) Legislative District No. 25 shall include all the area contained within Cassia County; all the area contained within the following precincts of Minidoka County: Heyburn No. 1, Heyburn No. 2, Rupert No. 2, and that portion of Rupert No. 4 lying south of a line beginning at the intersection of State Highway No. 25 and the eastern precinct boundary (the Snake River), then west on State Highway No. 25 to 100 East Road, then north on 100 East Road to 100 North Road, then west on 100 North Road to the precinct boundary; and all the area contained within the following precinct of Twin Falls County: Murtaugh.

(26) Legislative District No. 26 shall include all the area contained within Clark, Custer, Jefferson and Lemhi Counties.

(27) Legislative District No. 27 shall include all the area contained within Madison County; and all the area contained within the following precincts of Fremont County: Egin, Island Park, Newdale, Parker, Teton and Wilford.

(28) Legislative District No. 28 shall include all the area contained within Teton County; all the area contained within the following precincts of Fremont County: Ashton No. 1, Ashton No. 2, Chester, Drummond, Lamont, St. Anthony No. 1, St. Anthony No. 2, St. Anthony No. 3, Squirrel, Twin Groves and Warm River/Green Timber; and all the area contained within the following precincts of Bonneville County: No. 21, No. 23, No. 40, No. 43, No. 44, No. 45, No. 46, No. 47, No. 52, No. 53, No. 54 and No. 55.

(29) Legislative District No. 29 shall include all the area contained within the following precincts

of Bonneville County: No. 1, No. 2, No. 3, No. 4, No. 5, No. 6, No. 7, No. 8, No. 9, No. 13, No. 14, No. 22, No. 36, No. 37, No. 38, No. 39 and No. 41.

(30) Legislative District No. 30 shall include all the area contained within the following precincts of Bonneville County: No. 10, No. 11, No. 12, No. 15, No. 16, No. 17, No. 18, No. 19, No. 20, No. 24, No. 25, No. 26, No. 42, No. 48, No. 49, No. 50, No. 51, No. 56 and No. 57.

(31) Legislative District No. 31 shall include all the area contained within Butte County; and all the area contained within the following precincts of Bingham County: that portion of Blackfoot No. 1 lying outside the Fort Hall Indian Reservation, that portion of Blackfoot No. 2 lying north of Mitchell Street, Fisher Avenue and E. Alice Street, Blackfoot No. 5, that portion of East Firth lying outside the Fort Hall Indian Reservation, East Shelley, Groveland, Jameston, Moreland, Pingree, Riverside, Rockford, Shelley, Wapello, West Shelley and West Firth.

(32) Legislative District No. 32 shall include all the area contained within Bear Lake, Caribou, Franklin and Oneida Counties; and all the area contained within the following precincts of Bannock County: that portion of Arimo lying west of a line beginning at the intersection of Smith Canyon Road with the railroad tracks and a road running parallel to the tracks on the west, north on this road into Arimo on S. Front Street to Woodland Avenue, west on Woodland Avenue to Old Highway 91 and north on Old Highway 91 to the precinct boundary, and Downey.

(33) Legislative District No. 33 shall include all the area contained within the following precincts of Bannock County: No. 1, No. 2, No. 3, No. 4, No. 5, No. 6, No. 7, No. 8, No. 9, No. 10, No. 11, No. 12, No. 21, No. 22, that portion of No. 28 lying outside the Pocatello City limits, No. 29, No. 33, that portion of No. 34 lying outside the Chubbuck City limits, No. 50, that portion of Arimo lying east of a line beginning at the intersection of Smith Canyon Road with the railroad tracks and a road running parallel to the tracks on the west, north on this road into Arimo on S. Front Street to Woodland Avenue, west on Woodland Avenue to Old Highway 91 and north on Old Highway 91 to the precinct boundary, Inkom, Lava Hot Springs and McCammon.

(34) Legislative District No. 34 shall include all the area contained within the following precincts of Bannock County: No. 13, No. 14, No. 15, No. 16, No. 17, No. 18, No. 19, No. 20, No. 23, No. 24, No. 25, No. 26, No. 27, that portion of No. 28 lying within the Pocatello City limits, No. 30, No. 31, No. 32, No. 51, No. 52, No. 53, No. 82, that portion of No. 85 lying east of U.S. Highway 91, and that portion of No. 87 lying east of U.S. Highway 91 and south of Reservation Road.

(35) Legislative District No. 35 shall include all the area contained within Power County; all the area contained within the following precincts of Bannock County: that portion of No. 34 lying within the Chubbuck City limits, No. 81, No. 83, No. 84, that portion of No. 85 lying west of U.S. Highway 91, No. 86 and that portion of No. 87 lying west of U.S. Highway 91 and north of Reservation Road;

and all the area contained within the following precincts of Bingham County: Aberdeen, that portion of Blackfoot No. 1 lying within the Fort Hall Indian Reservation, that portion of Blackfoot No. 2 lying south of Mitchell Street, Fisher Avenue and E. Alice Street, Blackfoot No. 3, Blackfoot No. 4, Blackfoot No. 6, that portion of East Firth lying within the Fort Hall Indian Reservation, Fort Hall and Sterling/Springfield. [I.C., § 67-202, as added by, 1992, ch. 13, § 2, p. 32; am. 1992, ch. 150, § 1, p. 451.]

(2)

Supreme Court, U.S.
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No. 93-208

In The

Supreme Court of the United States

October Term, 1993

IDAHO HISPANIC CAUCUS, INC.,
an Idaho Nonprofit Corporation, al al.,

Appellants,

v.

STATE OF IDAHO, et al.,

Appellees.

On Appeal From The United States District Court For The District Of Idaho

MOTION OF APPELLEE STATE OF IDAHO TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Did the Ninth Circuit Court of Appeals have the authority to transfer an appeal to this Court when Appellants appealed to the wrong court and the time for direct appeal had passed?

2. Alternatively, have Appellants, on this record, presented a substantial question?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

ADDITIONAL STATUTES INVOLVED..... 2

STATEMENT OF FACTS 2

ARGUMENT 4

1. THE COURT DOES NOT HAVE JURISDICTION OVER THIS APPEAL BECAUSE THE APPEAL WAS NOT TAKEN IN TIME..... 4

2. THE QUESTION PRESENTED IS SO UNSUBSTANTIAL ON THIS RECORD AS NOT TO REQUIRE FURTHER ARGUMENT..... 9

CONCLUSION 13

APPENDIX

SUPPLEMENTAL STATUTES INVOLVED IN THIS APPEAL.....App. 1

TABLE OF AUTHORITIES

Page

CASES

Brewer v. Ham, 876 F.2d 448 (5th Cir. 1989).....10, 11

Brown v. Thomas, 462 U.S. 835 (1983)..... 2

Chapman v. Meier, 420 U.S. 1 (1974) 9

Donovan v. Richland Cty. Ass'n for Retarded Citizens, 454 U.S. 390 (1982).....7, 8

Growe v. Emison, ___ U.S. ___, 113 S.Ct. 1075 (1993) 8

McNeil v. Springfield Park District, 851 F.2d 937 (7th Cir. 1988) 10

Thornburg v. Gingles, 478 U.S. 30 (1986) 8, 10, 11

Turner v. Arkansas, 784 F.Supp. 553 (E.D. Ark. 1991).....11, 12

Voinovich v. Quilter, ___ U.S. ___, 113 S.Ct. 1149 (1993) 8

STATUTES AND RULES

23 U.S.C. § 2284.....3, 5

28 U.S.C. § 610.....2, 7

28 U.S.C. § 1253..... 4, 5, 8

28 U.S.C. § 1291.....2, 5

28 U.S.C. § 1631.....4, 6

42 U.S.C. § 1973..... 3

Idaho Code § 67-202..... 2

S.Ct. Rule 18.1..... 2, 4, 5

No. 93-208

In The

Supreme Court of the United States

October Term, 1993

IDAHO HISPANIC CAUCUS, INC.,
an Idaho Nonprofit Corporation, al al.,

Appellants,

v.

STATE OF IDAHO, et al.,

Appellees.

On Appeal From The United States District Court For The District Of Idaho

MOTION OF APPELLEE STATE OF IDAHO TO DISMISS OR AFFIRM

Pursuant to Sup. Ct. Rule 18.6, Appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the three-judge panel on the grounds that the appeal has not been taken in time and that the question presented is so unsubstantial on this record as not to need further argument.

ADDITIONAL STATUTES INVOLVED

28 U.S.C. § 610; 28 U.S.C. § 1291; and S.Ct. Rule 18.1. The pertinent text to these supplemental statutes is set forth in Appellees' appendix.

STATEMENT OF FACTS

On February 28, 1992, the Idaho Legislature, as required by art. 3, sec. 4 of the Idaho Constitution, passed legislation to reapportion itself. The legislation, House Bill 760, received bipartisan support and was signed into law by Governor Andrus on March 2, 1992. House Bill 760, now codified as Idaho Code § 67-202, reduces the size of the legislature from 42 to 35 districts. The plan provides for one state senator and two state representatives per district. There are no floaterial districts. Further, the reapportionment plan enacted by the legislature contained a 9.9 percent deviation, rendering it presumptively constitutional under the Supreme Court's one person-one vote principle. *Brown v. Thomas*, 462 U.S. 835 (1983).

A prior reapportionment plan, Senate Bill 1269, was passed by the Idaho Legislature and vetoed by Governor Andrus. That bill received no support from Democratic legislators, and the veto message by Governor Andrus stated that he would sign a bill reapportioning the Idaho Legislature only if the legislation received bipartisan support.

It is important to note that House Bill 760 did not geographically divide any consequential portion of the

four Indian reservations in the State of Idaho. Representatives from Idaho's Indian tribes testified before legislative subcommittees requesting that the reservations be left intact within the respective districts. Further, the legislature did attempt to accommodate the concerns of Idaho's Hispanic population after receiving testimony at legislative hearings. For example, in Canyon County, the primary county involved in this case, the legislature created three districts comprised of 8.7 percent, 10.6 percent and 20.1 percent Hispanics. In other words, the legislature concentrated most Hispanics in one legislative district in Canyon County.

On May 5, 1992, the Idaho Hispanic Caucus, Inc., Appellants herein, filed its complaint challenging House Bill 760 as violative of the United States Constitution and the Voting Rights Act of 1965, as amended in 1982. 42 U.S.C. § 1973 (Supp. 1992). Appellants alleged that House Bill 760 diluted Hispanic voting strengths in Canyon County, Magic Valley, and the Pocatello area. Appellants also claimed that the plan was invalid due to the multimember districting, political gerrymandering, and efforts by legislators to protect incumbents. Appellants' complaint further alleged that House Bill 760 diluted the voting strength of Idaho's Indian populations.

Plaintiffs requested a three-judge panel be convened to hear their claims pursuant to 23 U.S.C. § 2284, and a three-judge panel was properly convened. On July 2, 1992, the State of Idaho, Appellees herein, filed its motion for summary judgment. Oral argument was heard on September 21, 1992, and on December 10, 1992, the panel

granted the State of Idaho's motion for summary judgment, thereby denying Plaintiffs' claim for injunctive and other relief.

On January 7, 1993, Appellants filed a notice of appeal with the Ninth Circuit Court of Appeals. Appellees filed a motion to dismiss Appellants' appeal on May 27, 1993, based upon the fact that direct appeal to the United States Supreme Court was the proper course of procedure under 28 U.S.C. § 1253. On June 25, 1993, the Ninth Circuit Court of Appeals dismissed the appeal for lack of jurisdiction, but then purported to "transfer" the appeal to this Court.

ARGUMENT

1. THE COURT DOES NOT HAVE JURISDICTION OVER THIS APPEAL BECAUSE THE APPEAL WAS NOT TAKEN IN TIME

Appellees move this Court to dismiss this appeal because it was not taken in time. Appellants had 30 days to file a direct appeal to this Court. *See* Sup. Ct. Rule 18.1. It is now nine months since the three-judge panel's decision. Appellants' failure to file a timely appeal cannot be circumvented by the Ninth Circuit's misapplication of 28 U.S.C. § 1631, the limited transfer statute employed. That statute does not grant the Ninth Circuit authority to transfer cases to the United States Supreme Court. Thus, Appellants' failure to follow the proper procedural course warrants dismissal.

As noted, when Appellants brought their challenge to Idaho's statewide legislative reapportionment plan, alleging violations of the United States Constitution as well as section 2 of the Voting Rights Act, they requested that a three-judge panel be convened to hear their claims. 23 U.S.C. § 2284 requires that a three-judge panel be convened "when an action is filed challenging the constitutionality of . . . the apportionment of any statewide legislative body." As required, a panel was convened.

When the panel granted Appellees' motion for summary judgment, Appellants' next step pursuant to 28 U.S.C. § 1253 should have been a direct appeal to this Court. 28 U.S.C. § 1253 provides:

> **Direct appeals from decisions of three-judge courts.** Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Here, since a properly convened three-judge panel had denied injunctive and other relief, Appellants' clear course of action was a direct appeal to the Supreme Court. Moreover, under Sup. Ct. Rule 18.1, Appellants had 30 days in which to make this appeal. Thus, Appellants' appeal should have been filed with this Court by January 11, 1993.

Rather than filing a direct appeal to the Supreme Court, on January 7, 1993, Appellants filed their appeal with the Ninth Circuit Court of Appeals. The Ninth Circuit Court of Appeals did not have jurisdiction. 28 U.S.C.

§ 1291 provides that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of district courts of the United States . . . except where a direct review may be had in the Supreme Court." Appellants' right to pursue a direct appeal to this Court also served to deprive the Ninth Circuit Court of Appeals of any jurisdiction.

Appellees filed a motion to dismiss with the Ninth Circuit Court of Appeals, since that court did not have jurisdiction. The Ninth Circuit Court of Appeals clearly understood Appellants had filed in the wrong court, and the court granted Appellees' motion to dismiss. However, at the same time, the Ninth Circuit also purported to "transfer" the appeal to this Court pursuant to 28 U.S.C. § 1631. This was on June 25, 1993, more than six months after the three-judge panel's final order.

28 U.S.C. § 1631 does not give the Ninth Circuit authority to transfer appeals to the Supreme Court. 28 U.S.C. § 1631 provides:

> **Transfer to cure want of jurisdiction.**
>
> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon

> which it was actually filed in or noticed for the court from which it is transferred.

This statute does grant the Ninth Circuit Court of Appeals some authority to transfer cases to cure jurisdictional defects. However, transfers can only be made to "such court" as is "defined" by 28 U.S.C. § 610, which states:

> **Courts defined**
>
> As used in this chapter the word "courts" includes the courts of appeals and district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, the United States Claims Court and the Court of International Trade.

The United States Supreme Court is notably absent from this list of courts to which transfers may be made.

The Ninth Circuit, in dismissing the appeal, was clearly aware Appellants had not followed the proper procedural route. Of course, by June 25, 1993, it was also apparent Appellants' 30-day time period to appeal to this Court had long since run. The Ninth Circuit, in its effort to save Appellants' case, acted beyond the scope of authority granted to it.

In *Donovan v. Richland Cty. Ass'n for Retarded Citizens*, 454 U.S. 390 (1982), this Court was presented with a similar situation. Appellants had improperly appealed to the Ninth Circuit Court of Appeals from a three-judge panel decision. In *Donovan*, the Ninth Circuit rendered an opinion and an appeal was filed with this Court from that decision. This Court first vacated the Ninth Circuit's

judgment on the ground that the Court of Appeals lacked jurisdiction. This Court then dismissed the appeal, stating the appeal was time barred:

> In addition, the appeal filed from the decision of the Court of Appeals must be dismissed. Appellants' proper course of conduct was to file a direct appeal from the decision of the District Court. At this time, however, such relief is foreclosed by 28 U.S.C. § 2101(a).

454 U.S. at 390.

The procedure followed in cases involving apportionment of statewide legislative bodies advances critical public policy concerns in a federal/state system of government such as ours. Direct appeal to the Supreme Court provides an expedited review and final decision. It acknowledges the importance of state legislatures in our system of government and the corresponding importance of avoiding prolonged and unnecessary disruption of state legislative bodies.

Having failed to follow the proper procedural course, Appellants' appeal should be dismissed. Moreover, the Ninth Circuit Court of Appeals should not be allowed, through its misapplication of a limited transfer mechanism, to circumvent the strict time limits for direct appeals to this Court. As in *Donovan*, Appellants' predicament is a result of their "simple failure . . . to follow the clear commands" of the procedural statute at issue. 454 U.S. at 391. Not only does 28 U.S.C. § 1253 make clear where this appeal should have been filed, so do numerous reapportionment opinions issued by this Court. *See Thornburg v. Gingles*, 478 U.S. 30 (1986); *Growe v. Emison*, ___ U.S. ___, 113 S.Ct. 1075 (1993); *Voinovich v.*

Quilter, ___ U.S. ___, 113 S.Ct. 1149 (1993). Each of these reapportionment cases involved direct appeals to this Court from three-judge panel decisions. Indeed, in an earlier opinion, *Chapman v. Meier*, 420 U.S. 1, 14 (1974), this Court expressly stated that a direct appeal to it from a three-judge panel decision addressing statewide reapportionment was proper:

> Subject matter of this kind is regular grist for the three-judge court, and that route typically has been employed under conditions similar to those present here. . . . We think this is correct procedure and we conclude that we have jurisdiction.

The statutes at issue, as well as prior Supreme Court opinions, give clear guidance as to the proper appellate procedure.

It is now nearing one year since the three-judge panel issued its decision. Appellees move that this appeal be dismissed on the ground that it has not been taken in time.

2. THE QUESTION PRESENTED IS SO UNSUBSTANTIAL ON THIS RECORD AS NOT TO REQUIRE FURTHER ARGUMENT

Appellees believe that relief is foreclosed in this case by the 30-day time limit for direct appeals. However, in an excess of caution, Appellees will also address Appellants' contention that this appeal raises a substantial question. Based upon this record, the question presented is so unsubstantial as not to require further argument.

Appellants contended, in district court, that they should be able to bring an "influence" claim under the Voting Rights Act. In *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986), this Court held that, in order to sustain a section 2 claim, a minority group must "demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district." The Court also noted that "unless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." 478 U.S. at 451, n.17.[1]

Since *Gingles*, lower courts have applied this bright-line test and rejected challenges where the minority could not constitute a majority in a single-member district, but nevertheless sought to bring an "influence" claim. For example, in *McNeil v. Springfield Park District*, 851 F.2d 937, 944 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989), the Seventh Circuit reasoned that to create a new cause of action for influence claims under section 2 would "invite[] courts to build castles in the air, based on quite speculative foundations." Likewise, in *Brewer v. Ham*, 876 F.2d 448 (5th Cir. 1989), the court followed the Seventh Circuit in rejecting an influence claim, stating:

> Courts must . . . measure the alleged discriminatory election system against an ideal electoral system which does not contain the challenged structure. . . . If the minority group is disbursed

---

[1] The *Thornburg* test also requires a showing that the minority is politically cohesive and that whites vote as a bloc usually to defeat the minorities' preferred candidates. *Id.*

> throughout the electoral district or is so small in proportion to the electorate as a whole, such that even under a single-member district plan the minority is not assured the power to elect representatives of its choice, the at-large feature of the election system, by itself, cannot be said to violate Section 2.

876 F.2d at 455. To do otherwise, the court noted, would be to engage in sheer speculation about the outcome of whatever remedy could be imposed. "Courts do not adjudicate with crystal balls." *Id.* More recently, in *Turner v. Arkansas*, 784 F.Supp. 553 (E.D. Ark. 1991), *summ. aff'd* ___ U.S. ___, 112 S.Ct. 2296 (1992), a three-judge panel unanimously rejected an influence claim, and that decision was summarily affirmed by this Court.

In this case, the three-judge panel drew upon a solid body of case law which held that claims such as Appellants' cannot be brought under the Voting Rights Act. Moreover, the panel had before it a substantial factual record to support its determination. Appellants neither alleged nor argued that, in conjunction with white votes, they could be assured the power to elect candidates of their choice. Rather, they contended that the first prong of the *Gingles* test "should only be applied in those actions where a minority is able to constitute a majority of a single-member district." Appellants' theory was that the brightline test only applied where it could be met. They offered nothing more on this. Appellants then asked the panel to "maximize[] the political participation of the Hispanic population" and requested the court provide Appellants special treatment through the creation of a house subdistrict and draw that district in a manner that

absolutely maximized their potential voting influence. All districts in Idaho, whether or not they contain Hispanics, are allocated two representatives pursuant to the Idaho Constitution. The court reviewed numerous documents evidencing the extensive legal counsel Idaho's legislature had received throughout the reapportionment process, the attempts that had been made to reconcile the various and sometimes conflicting interests and values involved, and the efforts on the part of the legislature to fairly accommodate Idaho's Hispanic and Native American population. The court, in reaching its decision to reject Appellants' claim, concluded that "the record suggests that, while the result may not be perfect and may not please 100 percent of the population, Idaho's legislative redistricting plan attempted to accommodate, rather than discriminate against, the concerns of the Hispanic and Native American minority groups."

Like *Turner v. State of Arkansas*, 784 F.Supp. 553 (E.D. Ark. 1991), the question presented on this record is so unsubstantial as not to require further argument. Appellees ask that the three-judge panel's decision be summarily affirmed.

CONCLUSION

Appellants failed to follow the clear rules, and their appeal should be dismissed for not having been timely made. In the alternative, Appellees move, for the reasons stated herein, that the judgment be summarily affirmed.

Respectfully submitted,

LARRY ECHOHAWK
Attorney General
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Deputy Attorney General
Chief of Civil Litigation

APPENDIX

§ 610. Courts defined

As used in this chapter the word "courts" includes the courts of appeals and district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, the United States Claims Court and the Court of International Trade.

(As amended Oct. 31, 1951, c. 655, § 44, 65 Stat. 725; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348; Oct. 10, 1980, Pub. L. 96-417, Title V, § 501(15), 94 Stat. 1742; Apr. 2, 1982, Pub. L. 97-164, Title I, § 120(a), 96 Stat. 33.)

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§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

(As amended Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348; Apr. 2, 1982, Pub.L. 97-164, Title I, § 124, 96 Stat. 36.)

Rule 18. Appeal from a United States District Court

.1. A direct appeal from a decision of a United States district court, when authorized by law, is commenced by filing a notice of appeal with the clerk of the district court within 30 days after the entry of the judgment sought to be reviewed. The time may not be extended. The notice of appeal shall specify the parties taking the appeal, shall designate the judgment, or part thereof, appealed from and the date of its entry, and shall specify the statute or statutes under which the appeal is taken. A copy of the notice of appeal shall be served on all parties to the proceeding pursuant to Rule 29 and proof of service must be filed in the district court with the notice of appeal.

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(3)

Supreme Court, U.S.
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Appellees.

On Appeal From The United States District Court For The District Of Idaho

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. The Ninth Circuit Court of Appeals did have the authority to transfer the appeal to this Court.

2. Appellants, on this record, have presented a substantial question.

TABLE OF CONTENTS

Page

STATEMENT OF FACTS 2

ARGUMENT 2

CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES

Donovan v. Richland County Association for Retarded Citizens, 454 U.S. 389 (1982) 4

Growe v. Emison, ___ U.S. ___, 113 S.Ct. 1075 (1993) 6

Thornburg v. Gingles, 478 U.S. 30 (1986) 6

Voinovich v. Quilter, ___ U.S. ___, 113 S.Ct. 1149 (1993) 5, 6

STATUTES AND CONSTITUTIONS

28 U.S.C. § 610 ..... 3, 4

28 U.S.C. § 1253 2

28 U.S.C. § 1291 4

28 U.S.C. § 1631 ..... 2, 3, 4

U.S. Const., art. III, § 2 4

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BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

STATEMENT OF FACTS

The Statement of Facts is presented in Appellants' Jurisdictional Statement, pages 4 through 10.

ARGUMENT

1. THE COURT POSSESSES JURISDICTION OVER THIS APPEAL BECAUSE THE COURT OF APPEALS ACTED WITHIN ITS AUTHORITY WHEN IT TRANSFERRED THE APPEAL TO THIS COURT

The Motion to Dismiss by the State of Idaho should be denied because jurisdiction is proper. The jurisdiction of this Court was invoked based on 28 U.S.C. § 1253 (1988), which allows direct appeals from decisions of three-judge courts. Appellees seek to circumvent any hearing of the substantive issues presented on appeal by narrowly interpreting 28 U.S.C. § 1631. Appellees challenge the Ninth Circuit Court of Appeal's use of 28 U.S.C. § 1631 to effect transfer of this appeal to this Court. The language of 28 U.S.C. § 1631 provided the Ninth Circuit Court of Appeals with the necessary authority to transfer the appeal. Specifically, 28 U.S.C. § 1631 provides:

> Transfer to cure want of jurisdiction.
>
> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any

> other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

In Appellee's Motion to Dismiss (p.7), they note that 28 U.S.C. § 1631 grants the Ninth Circuit Court of Appeals some authority to transfer cases to cure jurisdictional defects. Appellees, however, contend that the definition of "such court" as "defined" by 28 U.S.C. § 610 does not include the U.S. Supreme Court. 28 U.S.C. § 610 states:

> Courts defined
>
> As used in this chapter the word "courts" includes the courts of appeals and district courts of the United States, the United States District Court of the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, the United States Claims Court and the Court of International Trade.

Appellees suggest that 28 U.S.C. § 610 does not specifically mention the United States Supreme Court and therefore the statute did not create the power necessary for the Ninth Circuit Court of Appeals to transfer this appeal to the U.S. Supreme Court. This narrow reading is inconsistent with the purposes behind the statute and if adopted would result in a manifest injustice. As adequately noted by the Appellees in their Motion to Dismiss (p.7), 28 U.S.C. § 1631 was designed to cure jurisdictional defects resulting from complaints or appeals filed in the wrong court.

The legislative intent was to provide a provision which is broadly drafted to permit transfer between any two federal courts. Appellees' narrow interpretation of 28 U.S.C. § 610, however, would severely limit the remedial parameters and intent of the statute. A correct reading of 28 U.S.C. § 610 includes the U.S. Supreme Court within the broad term "courts of appeals." As embodied in Article III, Section 2 of the U.S. Constitution, the U.S. Supreme Court's appellate jurisdiction establishes this Court's status as the ultimate "court of appeal".

Further Appellees relied heavily on this Court's holding in *Donovan v. Richland County Ass'n for Retarded Citizens*, 454 U.S. 389 (1982), to support this motion to dismiss. In *Donovan*, the appellants had appealed to the Ninth Circuit Court of Appeals from the decision of a three-judge panel. Subsequently, the Ninth Circuit rendered an opinion on the merits of the appeal. This Court vacated the Ninth Circuit's judgment on the ground that the Court of Appeals lacked jurisdiction under 28 U.S.C. § 1291 to decide the case on its merits. In accord with this Court's holding in *Donovan*, the Ninth Circuit did not attempt to decide the merits of this case. Instead, the Ninth Circuit utilized its power to transfer codified in 28 U.S.C. § 1631, so that this appeal could be heard on its merits by the appropriate court. As demonstrated by the present appeal, acceptance of Appellees' contentions would deprive Appellants of any meaningful review of the constitutional issues embodied within the appeal.

Under 28 U.S.C. § 1631, the Ninth Circuit Court of Appeals was within its power to transfer this appeal to the U.S. Supreme Court. Pursuant to 28 U.S.C. § 1631, the appeal should proceed as if it had been filed in or noticed

for this Court to which it was transferred on the date upon which it was actually filed in or noticed for the court from which it was transferred. The notice of appeal was timely filed on January 7, 1993 since that was within thirty (30) days of the original entry of judgment by the three-judge District Court. Since this appeal was transferred on June 25, 1993, and the Statement of Jurisdiction was submitted within sixty (60) days of the transfer date, this Court has proper jurisdiction over the matter.

2. THIS APPEAL PRESENTS A SUBSTANTIAL QUESTION AFFECTING THE VOTING FRANCHISE AND RIGHTS OF HISPANICS AND NATIVE AMERICANS

The record establishes that Idaho's Hispanic population and Native American population have been largely disenfranchised from the political process by the drawing of legislative districts in a manner to substantially dilute their proper influence.

This case presents the very substantial question of whether the courts of the United States are open to claims under the Voting Rights Act that a reapportionment plan divests minorities of their ability to influence the election of candidates to political office.

On March 2, 1993, the Supreme Court issued its opinion in *Voinovich v. Quilter*, ___ U.S. ___, 113 S.Ct. 1149 (1993) and confirmed that influence dilution claims are an open question when the Court assumed a minority influence dilution claim is a cognizable claim:

> Appellees in this case, however, do not allege that Ohio's creation of majority black districts

> prevented black voters from constituting a *majority* in additional districts. Instead, they claim that Ohio's plan deprived them of "influence districts" in which they would have constituted an influential *minority*. Black voters in such influence districts, of course, could not dictate electoral outcomes independently. But they could elect their candidate of choice nonetheless if they are numerous enough and their candidate attracts sufficient cross-over votes from white voters. *We have not yet decided whether influence-dilution claims such as appellees' are viable under § 2, Growe, 507 U.S. at ___, n. 5, 113 S.Ct. at 1084, n. 5; see Gingles, supra, 478 U.S. at 46-47, nn. 11-12, 106 S.Ct. at 2764, nn. 11-12 (leaving open the possibility of influence-dilution claims); nor do we decide that question today. Instead, we assume for the purpose of resolving this case that appellees in fact have stated a cognizable § 2 claim.*

Voinovich, 113 S.Ct. at 1155 (emphasis added).

CONCLUSION

We respectfully submit that the Motion to Dismiss should be denied and that this Court should take jurisdiction over and decide this very substantial question which has been left open in the prior pronouncements of this Court.

Respectfully submitted,

/s/ Robert C. Huntley, Jr.
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